88-1606

Supreme Court, U.S.
FILED
MAR 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

No.: _____

IN THE

Supreme Court of the United States

October Term, 1988

RALPH SCOPO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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63 pp

QUESTIONS PRESENTED

1. Whether petitioner was denied his right to a twelve person jury when the district judge refused to substitute an alternate juror for a discharged member of the jury who became unfit to proceed shortly after deliberations had begun?

2. Whether petitioner's constitutional rights to compulsory process and a fair trial were violated when the court refused to authorize subpoenas for individuals whom petitioner sought to call as witnesses on his own behalf?

LIST OF PARTIES

Petitioner was initially indicted with Carmine Persico, Hugh McIntosh, Gennaro Langella, John DeRoss, Anthony Scarpati, Alphonse Persico, Andrew Rush, Dominic Cataldo, and Dominic Montemarano. He was then severed, and ultimately tried with codefendant Dominic Montemarano.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

RALPH SCOPO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Ralph Scopo respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on October 28, 1988, affirming petitioner's conviction for violating the RICO statute and various predicate offenses.

OPINIONS BELOW

The opinion of the Court of Appeals is reprinted in the Appendix at pages 1a-23a. The order of the Court of Appeals denying petitioner's petition for rehearing appears in the Appendix at pages 24a-25a.

JURISDICTION

The Judgment of the Court of Appeals for the Second Circuit was entered on October 28, 1988. A timely petition for rehearing was denied on January 4, 1989. Thereafter, the Honorable Thurgood Marshall granted a thirty day extension of the date by which this petition must be filed. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment of the United States Constitition states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall any person be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of

law; nor shall private property be taken for public use, without just compensation.

Fed R. Crim P. 23(b) states, in relevant part:

[I]f the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors.

STATEMENT OF THE CASE

In the first trial on this indictment, Ralph Scopo was severed after two months of trial because of a very serious heart ailment. The Second Circuit has decided an appeal from convictions in that first trial, *United States v. Persico*, 832 F.2d 705 (2d Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1995 (1988), in which it observed that "the factual predicate for the convictions giving rise to this appeal has been recounted in numerous recent opinions." (*Citing United States v. Langella*, 804 F.2d 185 (2d Cir. 1986); *United States v. Russo*, 801 F.2d 624 (2d Cir. 1986); *United States v. Persico*, 774 F.2d 30 (2d Cir. 1985); *United States v. Persico*, 646 F.Supp. 752 (S.D.N.Y. 1986); *United States v. Persico*, 621 F.Supp. 842 (S.D.N.Y. 1985); *United States v. Persico*, 620 F.Supp. 836 (S.D.N.Y.), *aff'd*, 774 F.2d 30 (2d Cir. 1985); *United States v. Persico*, 520 F.Supp. 96 (E.D.N.Y. 1981)). Accordingly, the facts of this case will only be set forth briefly here.

History and Structure of the Indictment

Scopo was brought to trial again, with co-defendant Dominic Montemarano, on an indictment that was a substantially redacted version of the original indictment at

the *Persico* trial. As finally submitted to the jury (after the dismissal of some counts on the Government's motion during the trial), the indictment contained thirteen counts. Scopo was charged in eleven of them.

Count One was a RICO conspiracy count, in which it was alleged that Scopo and other co-defendants together constituted an enterprise which was described as "the Colombo Organized Crime Family of La Cosa Nostra." (A:36)[1] The purposes of the enterprise were described as consisting, *inter alia*, of obtaining money for members of the family through control and domination of both Local 6A of the Cement and Concrete Workers Union, and the District Council of Cement and Concrete Workers. It was alleged that Scopo used his position as President and Business Manager of the District Council to control Local 6A and the District Council on behalf of the Colombo Family (A:41), resulting in unlawful payments of money by building contractors to Scopo, who then distributed part of the proceeds to other members of the RICO enterprise. (A:37)

Count One proceeded to particularize the pattern of racketeering activity, insofar as it related to Scopo, in the following alleged racketeering acts. *Act 1*: participation from 1981 to about September of 1984 in a conspiracy to extort money from New York construction companies. (A:44-45) *Acts 2-9*: the actual commission of Hobbs Act extortions against eight separate construction companies over the period from 1981 through September of 1984. (A:45-46)

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[1] Numbers preceded by the letter "A" refer to pages of the joint appendix submitted to the Court of Appeals; numbers preceded by the letter "T" refer to pages of the trial transcript not included in the appendix.

Count Two was a substantive RICO count, which alleged that, from 1968 up to the date of the indictment, Scopo and others did conduct and participate in the affairs of the Colombo family through the pattern of racketeering activity already described. (A:48-49) Count 3 then charged a conspiracy to violate the Hobbs Act. (A:49-50) Finally, Counts 4 through 11 charged, as substantive Hobbs Act violations, the acts already set forth in the indictment as Racketeering Acts 2 through 9, *supra*. (A:50-51)

Theory and Nature of the Government's Case

The theory of the government's case was that Scopo was a formally inducted member of the "Colombo" Family of La Cosa Nostra. Carmine Persico was said to be the Boss of the Family, and co-defendant Dominic Montemarano was supposedly a "Capo" or captain. These, and others alleged to be Family members or associates, were indicted along with Scopo and (except for Montemarano who had also been severed for health reasons) were convicted at the earlier trial.

The government sought to prove that Scopo (who was alleged to be a "soldier", *i.e.*, an initiated member of the Family not holding any special executive position) extorted cash payments from contractors. This extortion was alleged to be part of a division of spoils in the construction industry under which illegal payments in connection with contracts, awarded to a "club" of six contractors, for pouring concrete on jobs that exceeded two million dollars in price were divided between the five Mafia families in New York City. By contrast, when the contract was under two million dollars in value, the payments were said to be the sole property of the Colombo family. The acts of racketeering

alleged in the indictment all referred to contracts that were supposedly under two million dollars in value.

Contractors testified for the Government in connection with the eight sets of extortion embraced by the counts. Their motive for testifying falsely had been secured by lenient treatment, including misdemeanor guilty pleas, by the government. For example, the first contractor to testify, Carlo D'Arpino, said that Scopo had asked him to pay him two dollars in cash for every yard of concrete poured. This was said to be to keep labor peace. (T:560-62) D'Arpino testified that he made payments on several jobs in cash (T:568), and also, at Scopo's suggestion, by making out wage checks to persons who did not show up as employees. (T:578-83) Other contractors testified to much the same effect. However, none of them made any clear claim that Scopo had ever threatened them with personal violence. If any threat was present, it was said to be the implicit one of labor disturbance or the failure to get concrete delivered.

In addition to the testimony of the contractors, the government also introduced numerous tapes into evidence. Many of these were of conversations between the defendant and contractors, and contained statements tending to corroborate some of the contractors' testimony. Yet, no conversation was recorded in which Scopo stated that he was acting on behalf of the Colombo Family or the Mafia.[2] Other tapes were introduced of conversations by co-defendants in which Scopo's name was mentioned from time to time. Government agents also testified as to surveillances, and introduced photographs showing that

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[2] Since the alleged RICO enterprise in this case was the Colombo Family, the connection between the alleged extortions and the Colombo Family was of course an important issue at trial.

Scopo had been present in restaurants and at a hotel in meetings with some of the co-defendants. In addition, a witness, Fred DeChristopher, who had received immunity and was in the government witness protection program, testified that Carmine Persico had told him that Scopo worked for Persico and that he (Persico) received money for all concrete poured in New York City. (T:5190)

Both in cross examination and in its own case, the defense showed that Scopo was a diligent officer of the Union; that he worked regularly at his job; and that he had participated in winning excellent contracts for union members. Scopo had been chairman of the trustees of the Union's fringe-benefit funds, including the pension and welfare funds, in the early 1980s. (T:6101-02) There was testimony from William Soracco, an administrator of the funds, that they were in sound financial condition, and that there were no allegations of missing funds. (T:6103) No testimony was offered against the defendant by any union member, nor was there any evidence that Scopo lived in a lavish way.

REASONS FOR GRANTING THE WRIT

I

DEFENDANT WAS DENIED HIS RIGHT TO A TWELVE PERSON JURY WHEN THE TRIAL COURT REFUSED TO SUBSTITUTE AN ALTERNATE JUROR FOR A DISCHARGED JUROR WHO BECAME UNFIT SHORTLY AFTER DELIBERATIONS BEGAN.

The question presented here affords this Court the unique opportunity to pass upon the impact of Fed. R. Civ. P. 23(b), as revised in 1983, upon the issue of whether a defendant has the right to insist upon proceeding with a jury of twelve. *Since the question has yet to be harmoniously resolved by the lower courts, review by this Court is particularly appropriate in this case.*

Shortly after jury deliberations had commenced, the court received a note from Juror No. 90, stating: "Judge, I don't think I can give a fair verdict. If you want me to explain this further, I will." (A:377) After discussion with the defense attorneys and Scopo[3], the court called the jury back and asked all except Juror No. 90 to retire again, but to cease deliberating. (A:381-82)

On being asked the nature of his problem, Juror 90 said that his mother was very ill and that he had had no contact with her. (A:382) He was emotionally distraught, sobbing, had difficulty in walking, and in fact fell down.

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[3] Scopo proceeded *pro se* at trial with the assistance of standby counsel.

(A:386, 389-90) Both defendants and the government immediately agreed that the juror should not continue, and the court responded by excusing him. (A:382)

An application for a mistrial by the defendants was denied (A:383-84), and Scopo then stated through standby counsel that he objected to proceeding with an eleven person jury, preferring instead to have an alternate seated. The court responded that, under the relevant rules, the preferred method was to proceed with eleven jurors and that he would follow this course. (A:385) Both defendants then reiterated their preference for a twelve person jury through the insertion of an alternate juror. They further offered to waive the requirement that deliberations should begin anew if an alternate were to be inserted. (A:386-88) The court rejected this request (A:385), and directed the remaining eleven jurors to continue their deliberations. (A:389-91) The Second Circuit did not offer a discussion this issue in its opinion, stating only that the claim had no merit.

We contend that the courts below erred in its decision on this issue. Where, as here, the alternates have not been excused, and a defendant is willing to waive any claim that deliberation should begin again, a defendant's preference for a twelve person jury should be honored. This is especially so here, where the deliberations had begun just hours before Juror 90 was excused.

Until 1983, courts were placed in a dilemma if circumstances arose under which a juror had to be excused after deliberations had begun. Fed. R. Crim. P. 23(b), as it read pre-1983, allowed a valid verdict to be returned by a jury of less than twelve only if the parties consented to such a verdict. A literal reading of the Rule seemed to require a mistrial in the absence of this stipulation. This conclusion was reinforced by the language of Fed. R. Crim.

P. 24(c), which required that alternate jurors should be discharged when the jury retires to deliberate, and thus could be interpreted as precluding the possibility of inserting an alternate into the deliberations.

Nevertheless, the wastefulness of declaring a mistrial after lengthy and complex proceedings led courts to disregard the language of Rule 24(c), and to retain alternates after deliberations had commenced. (As evidenced by this case, where the alternates were not discharged until after the jury had returned its verdict, this practice continues even after the 1983 amendment of the Rule.) In cases before 1983, several trial courts had ignored the seeming dictate of Rule 24(c), and had inserted an alternate into the deliberations when a deliberating juror had to be excused. This practice naturally came under review. In the Second Circuit, for example, the leading pre-1983 case was *United States v. Hillard*, 701 F.2d 1052 (2d Cir.), *cert. denied*, 461 U.S. 958 (1983), where, after refusal by the defense to stipulate to an eleven person jury, the trial court had substituted an alternate for a juror who had fallen ill after deliberations had proceeded for two and a half days.

Citing similar outcomes in other Circuits (*United States v. Phillips*, 664 F.2d 971 (5th Cir.), *cert. denied*, 457 U.S. 1136 (1981); *United States v. Kopituk*, 690 F.2d 1289 (11th Cir. .1982), *cert. denied*, 461 U.S. 928 (1983), the *Hillard* Court found the violation of Rule 24(c) to be harmless error. The substitution procedure, in the Court's view, preserved what this Court in *Williams v. Florida*, 399 U.S. 78 (1970), had regarded as the "essential feature" of the jury:

> the interposition between the defendant and the government of the community participation and shared responsibility of a group of lay persons.

> Alternates are chosen in the same way as other jurors and hear the same evidence. When a jury is instructed to begin its deliberations anew, its verdict may be regarded as the genuine product of the deliberations of the reconstituted twelve members.

701 F.2d at 1057.

The Court conceded in *Hillard* that the drafters of Rule 24(c) "did not envision post-submission substitution", *id.* at 1058, but regarded the ultimate question to be whether the appellants had been prejudiced by the substitution. The Court found no such prejudice, even though, in *Hillard*, the alternates admitted to having discussed the case together and to having formed opinions as to the guilt of the defendants. The Court of Appeals recognized the conventional objections to substitution (which will be reviewed below), but took the view that they can be overcome by careful instructions and supervision from the trial court. Concluding its comments on this point, the Second Circuit observed:

> [P]ending a change in the rule, juror substitution should be permitted only in complex cases where thorough precautions are taken to ensure that the defendants are not prejudiced.... We express no opinion on what our view would be if and when revised Criminal Rule 23(b) becomes effective.

701 F.2d at 1061.

Impact of the Revised Rule 23

Shortly after the review of the law in *Hillard*, the revision of Rule 23(b) took effect. The Rule now provides that, even absent a stipulation:

> [I]f the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court, a valid verdict may be returned by the remaining 11 jurors.

The questions that remain to be answered by this Court are (1) whether this revision has slammed the door on the practice of inserting an alternate into jury deliberations, and (2) if the answer to the first question is negative, whether it can be reversible error for the court to deny a defendant's request that an alternate be inserted. We contend that nothing in the 1983 revision has outlawed the previously well-established practice of inserting an alternate into jury deliberations. Indeed, for the reasons that follow, the revision removes much of the pre-1983 difficulty in condoning the practice, and therefore gives it a stronger claim to legitimacy. Under the pre-1983 rules, it was the defendant who assigned the inserting of the alternate as error, while the Courts of Appeals, faced with a plain violation of the letter of Rule 24(c), were forced to take refuge in the harmless error doctrine in order to uphold the conviction. But in the post-1983 cases, such as the present one, it is the *defendant* who seeks the insertion of the alternate, with the result that, if his application is granted, he has waived a claim of error on appeal. *See United States v. Guevara*, 823 F.2d 446, 448 (11th Cir. 1987).

There are powerful reasons supporting the implementation of a defendant's right to insist upon proceeding with twelve jurors. The defendant begins with a statutory right, founded in history and custom, to a twelve

person jury.[4] Perhaps there is no magic in the number "12", but once the statutory right has attached, it is clear that the defendant will most of the time suffer a disadvantage from a reduction of the jury from twelve to eleven. As a matter of common sense, it is more difficult to persuade twelve persons of guilt beyond a reasonable doubt than it is to persuade eleven persons. A defendant, therefore, ought to be treated with considerable solicitude when he seeks to hold the number of jurors at twelve.

We pay homage to that preference during the progress of a trial, for our system has adopted a vigorous and frequently exercised practice of inserting alternates. From the defendant's point of view, the right may be perceived as just as important even after deliberations have begun. Suppose, for example, the defendant has formed the impression that both the juror to be excused and the alternate who would be inserted had arrived at a favorable position towards the defendant. In such a case, forcing the defendant to proceed without either juror and to take the verdict of eleven imposes a serious disadvantage upon him.

It is true that objections have been noted to the practice of inserting an alternate into the deliberations. These are reviewed in the Notes of the Advisory Committee on the 1983 revision of Rule 23. They include the difficulty of reconstructing for the inserted alternate the deliberations of the jury that took place before he joined them, and the possibility that the original eleven will already have arrived at settled positions with which they may overwhelm the alternate and so deprive him of the

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[4] We recognize that the Constitution does not require a twelve person jury. *Williams v. Florida, supra.*

capacity to make an independent judgment.[5] However, as we have noted, pre-1983 decisions took the position that such difficulties could be effectively overcome by proper instructions from the court. Moreover, other jurisdictions are seemingly unimpressed by such asserted concerns. For example, New York State, by Section 270.35 of its Criminal Procedure Law, permits an alternate to be inserted even after deliberations have begun if the defendant consents. In any event, where a defendant is willing to take these chances, he should be accorded that opportunity.

Post-1983 Case Law

The small number of relevant decisions in the Courts of Appeals since 1983 present a mixed picture, but certainly do not uniformly oppose the arguments advanced here. Although the Third Circuit did characterize the position being espoused here as "absurd", *United States v. Gambino*, 788 F.2d 938, 948 (3d Cir.), *cert. denied*, ___ U.S. ___, 107 S.Ct. 98 (1986), we contend that *Gambino* is wrongly decided. Moreover, that Court may not have had the advantage of an opportunity fully to consider the arguments raised here. The decision in *United States v. Guevara*, *supra*, is more instructive. *Guevara* is a case in which, upon excusing a juror after deliberations had begun, the trial court, rather than proceeding with eleven jurors, acceded to a defense request to substitute an alternate. After conviction, the defendant appealed on the ground that, in granting the defendant's request, the trial court had

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[5] The second alleged problem seems illusory, since it is hard to see how it could place the defendant in a *worse* position than if the eleven jurors were left alone with the position upon which they had already settled.

committed reversible error by violating Rules 23(b) and 24(c).

The Eleventh Circuit first asserted the continuing validity of its pre-1983 decisions holding that the substitution of an alternate juror after the start of deliberations does not automatically constitute reversible error. According to the Court, error is committed only if the defendant is prejudiced. In any case, where the defendant consents to the substitution, he waives any challenge to that procedure on appeal. 823 F.2d at 448. Significantly, the Court then went on to comment:

> A criminal defendant quite reasonably may prefer to have his fate decided by a jury of twelve rather than a smaller group of eleven. The additional juror is one more person whom the government must convince beyond a reasonable doubt of the defendant's guilt.

Id.

Thus, "while [not authorizing] routine deviation from the terms of Rule 24(c)", *id.*, the Eleventh Circuit clearly recognized the propriety of the court's exercise of discretion, on application by the defendant, to substitute an alternate rather than take the verdict of eleven. *Guevara* thus implicitly rejects the argument that the revision of Rule 23 has made such action improper.

It is therefore clear that a court has the discretion to substitute an alternate rather than follow the Rule 23(b) procedure of proceeding with an eleven member jury, so long as the action is taken in response to an application by the defendant. We now proceed to argue that it was an abuse of discretion amounting to reversible error, for the

trial court to have denied this request from the defendants here.

The Federal Rules of Criminal Procedure "establish juries of twelve as the national norm", *United States v. Reed*, 790 F.2d 208, 211 (2d Cir.), *cert. denied*, ___ U.S. ___, 107 S.Ct. 445 (1986). As Justice Brennan, writing in *Brown v. Louisiana*, 447 U.S. 323, 332 (1980), observed, "a decline in jury size leads to less accurate factfinding and a greater risk of convicting an innocent person." Thus custom, rule and considerations of rational self-interest combine to give a defendant powerful arguments for maintaining the size of the jury at twelve. These factors ought to lead to a deferential response to a defendant's request for substitution, and to a threshold presumption that refusal of such a request is an abuse of discretion. Such a presumption is particularly appropriate here, where there were no circumstances special to the case that made substitution peculiarly difficult. This is not a case, for example, where a juror had to be excused after many days of deliberation. The only apparent obstacle to accepting our position here is the "preferred solution" expressed by Rule 23(b) for proceeding with eleven jurors.

But, on reflection, the revision of Rule 23(b) provides no reason for not requiring a court to substitute a juror when the defendant requests it and there are no other weighty countervailing reasons. The best understanding of the revision of Rule 23 is that it was necessary to clarify the propriety of imposing a judicial remedy *when the defendant is unwilling to accede to any remedial proposal.* Pre-1983, a defendant had strong incentives to refuse both an eleven person jury and the alternative of substituting a juror, since the Rules did not clearly allow any remedy in the absence of a defendant's consent. Thus, the defendant could simply move for a mistrial and argue on appeal that

the court had breached Rule 23 by substituting a juror. These arguments were rejected by the Courts of Appeals, but the situation was nevertheless an uncomfortable one in the absence of any express rule permitting an imposed solution. The revised Rule now empowers the court to take an eleven person verdict if the defendant does not request the substitution of a juror, or where substitution might be impossible either because deliberations had already been very lengthy or because all alternates had been used up. This is an effective solution since it accomplishes two objectives: (1) it allows the defendant to enjoy the benefit of a twelve person jury whenever possible, and (2) in effect it insures that substitution will not take place unless requested by the defendant who, by the waiver of Rule 24(c) contained in such an application, is thereby properly barred from raising the issue as error on appeal.

Under our view of the law, a court not only retains the power to substitute a juror, but ought to do so at the defendant's request unless there are other circumstances that make such a step impossible or very imprudent. A court abuses its discretion, and commits reversible error, when it denies a defendant's reasonable request for substitution and takes an eleven person verdict in the face of such a request. This prejudicial error was committed in the present case by the denial of Scopo's motion for insertion of the alternate. Accordingly, this Court should reverse his conviction.

II

DEFENDANT'S CONSTITUTIONAL RIGHTS TO COMPULSORY PROCESS AND A FAIR TRIAL WERE VIOLATED WHEN THE COURT REFUSED TO AUTHORIZE SUBPOENAS FOR INDIVIDUALS WHOM DEFENDANT SOUGHT TO CALL AS WITNESSES ON HIS OWN BEHALF.

During trial, Scopo requested the court to issue subpoenas to construction contractors who, he asserted, would testify that they had had dealings with him in connection with concrete work on buildings. Scopo claimed that these contractors would testify that Scopo had never asked them for any monies, and that he had always behaved legitimately in his dealings with them. The court questioned the relevancy of such testimony, likening it to a situation where a defendant, charged with robbing a bank, wished to call witnesses who would testify that he had often done business in banks without robbing them. (A:155-56) Thus, the court perceived the proffer as amounting to no more than evidence that the defendant had *not* committed similar crimes with or against others.[6]

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[6] The procedural setting in which this issue arose was unusual. Because of Scopo's *pro se* status, the District Court (Judge John F. Keenan) insisted upon a prior review of the people Scopo planned to call as witnesses. Only then, upon a finding that the witness would be offering what the court viewed to be admissible testimony, would Judge Keenan authorize the service of a subpoena upon the witness.

At trial, Scopo pointed out that the theory of the Government's case was that organized crime allowed *all* concrete work involving more than two million dollars to be done *only* by members of a small "Club" of contractors. Government witness, Stanley Sternchos, had named firms who, he said, were members of the Club, and had testified that, on such big deals, Club members paid two percent of the contract price to Scopo, with the payments then divided among the New York organized crime families. Scopo stated that the purpose of calling contractors was to have these alleged members of the Club testify that they had done business with Scopo on large contracts without any question of extortion payments. They would also deny that any Club existed. Furthermore, other contractors would testify that they had done work over two million dollars, although they were not named by government witnesses as members of the Club. Such testimony would have directly contradicted the testimony of government witnesses on a key element of the government's theory of the case. (A:157-58)

When the matter was raised again at a later point, standby counsel gave the names of contractors and employees of contractors sought to be subpoenaed. They were: John Gambino and Tony Genovese, who constituted the firm of G & G that was named by Sternchos as a member of the Club, and who would testify that in their dealings with Scopo he had never made any attempt at extortion; Pat Bruno (another alleged member of the Club) who would testify that he knew nothing of any club and had only had legitimate dealings with Scopo; May Weiner, a bookkeeper for Century Maxim (named as a member of the Club) who would testify that she knew Scopo, but had no knowledge of any bribes paid to him; Anthony Grace who was not named as a Club member, but who would testify that he had done jobs in excess of two million dollars; Joe

Martinelli of Northbury, alleged to be a member of the Club, who would testify that he knew nothing of any such club; Joe Conto, Fred DeMatteis, Gerard Lolo and Donald Trump who would testify that they knew nothing of any club, but did do jobs over two million dollars; and, last, Joe DiPola and Frank Phelan, who would testify that they did a large amount of concrete work in Manhattan and that Scopo had never tried to extort anything from them. (A:208-09)

For the reasons it had earlier stated, the trial court ruled that this testimony would be collateral, and therefore declined to allow the witnesses to testify. (A:219) This ruling was based upon an overly-narrow, and erroneous, understanding of relevance in this case. It denied Scopo a chance to present a full and fair defense, and thereby violated his due process rights and his right to compulsory process.

The court's exclusion of the proffered testimony ignored, in the first place, the special nature of the charges and the government's theory. The RICO counts made up the centerpiece of the indictment. Under the statute, these counts contained necessary allegations of association with an enterprise and conduct of the enterprise through a pattern of racketeering. Such charges are vastly different from charges that an individual simply committed various crimes at different times. Under RICO, the offenses must be seen in a special way -- as being bracketed and unified by their purposive links with the enterprise.

In this connection, the Government's theory was that Scopo, in his capacities as a member of the Colombo crime family and head of the Union, *made a practice* of extorting a percentage of the price of *every* contract for pouring concrete. This was not portrayed as an occasional opportunistic foray (as might be the case with bank

robberies) but as a dedicated way of life. Indeed, the nature of the Government's theory might be taken to suggest that Scopo would have been performing unnaturally and endangering himself if he permitted any concrete work to be done without exacting an extortionate toll. The bulk of the money was alleged to be flowing up to the highest echelon of the Families. They surely would not have been content for Scopo just to have picked the occasional victim at random.

The indictment claimed that Scopo had used his position in the Union on behalf of the Family. (A:41) In his opening statement the prosecutor unambiguously suggested the pervasiveness of the practices alleged against Scopo by saying:

> If you were a concrete contractor and you have a contract to pour concrete for a building, Scopo comes to you and says "you pay me 1 percent of the money that you are going to be paid for that building".... If your contract is for a million dollars, you pay Ralph Scopo and the Colombo family 1 percent, or $10,000.

(A:141-42)

> [I]f the concrete contract is worth more than $2 million, the Mafia families in New York get together and decide who gets what contract. And only a small number of companies that the Mafia controls are even allowed to bid on the job. The families then split the resulting payoffs.... But ... if the contract price for the concrete is less than $2 million, the payoffs belong to the Colombos.

(A:143-44)

Prosecution witnesses harped on the theme that payoffs were a universal requirement in dealing with Scopo. For example, Carlo D'Arpino, a contractor, testified that Scopo had told him that "*everyone* pays the same amount." (T:563) (Emphasis supplied) Stanley Sternchos laid out the rules and standards that supposedly governed all transactions. He testified that work over two million dollars was reserved for a group of six contractors, (the Club) comprising S & A Concrete, Cedar Park Concrete, Northbury Concrete, G & G Concrete, Century Maxim and XLO. (T:1723-24, 1728-29) Three of these firms were connected with persons Scopo wanted to called as potential witnesses.

Sternchos further testified that Scopo had told him that the Club was connected with the Mafia, who would decide in advance which Club member should be the low bidder on jobs. (T:1729-31) He asserted that Scopo told them that these contractors had to pay a two percent fee which was split among the Families. He (Scopo) attended family conferences on these matters. At these meetings, Scopo supposedly told Sternchos, Scopo represented two of the contractors (XLO and Century Maxim) from whom he collected money. (T:1729-33) Sternchos himself allegedly upset Scopo because, without being a member of the Club, he took on a four million dollar job. Sternchos testified that Scopo told him he could keep the job only if he would pay two percent to the Club as well as two percent to the Colombo Family. (T:1806-09)

Finally, witness Fred DeChristopher, who had harbored Carmine Persico while Persico was a fugitive, testified that Persico had told him that Scopo worked for Persico, and that "*not one yard of concrete is poured in New York*" without Persico getting some money for it. (T:5190) This

phrase was picked on and repeated to the jury by the prosecutor in his summation. (A:277)

Since this was a major theme in its case, the Government naturally returned to it in its summation. The prosecutor told the jury:

> You learned that through Ralph Scopo the Colombo family was able to get a piece or become a partner in *every construction job in which concrete was poured in the City of New York*. Virtually every one. Its a simple scheme. Pay the Colombo man, Ralph Scopo, or you don't build the building.

(A:266) (Emphasis supplied)

> If you control Ralph Scopo you control the union, those unions, and you can *control the whole industry*. You've learned that the Colombo family controlled Ralph Scopo.

(A:273) (Emphasis supplied)

The summation also reiterated the theory of the sharp division between jobs below two million and those above.

> There were two levels that we proved to you in this case. The dividing line was $2,000,000. Anything over $2,000,000, ... those jobs were reserved to a group of six contractors known as the Club. And you heard contractors tell you about that and you heard it all on tape.... But whether you were in the Club [or not] you still had to pay to stay in business.

(A:284-85)

Thus at every level of the case -- in its opening, in the testimony produced, and in its summation -- the government underscored its consistent themes that there was a constant, and universal, practice of extorting bribes for all concrete work, and that this extortion had a jurisdictional division at the $2,000,000 level. These were exactly the assertions that Scopo sought to contradict through the testimony of the witnesses he wished to call. However, his attempt at a defense was stillborn because of the court's refusal to let him challenge the government's central assertions.

There can be no doubt, as demonstrated above, that the government sought to prove Ralph Scopo's participation in the charged RICO conspiracy, as well as in the underlying specific alleged acts of extortion, by proving a systematic pattern of conduct in the construction industry. Clearly, this was the theory upon which witnesses were allowed to testify about the Club contracts that were outside the scope of the charges in the indictment. And, to be sure, the trial court did not abuse its discretion in admitting this evidence pursuant to Fed. R. Evid. 404(b). However, defendant was also entitled, on the unique facts of this case, to offer proof showing the absence of a general pattern of extortion in the construction industry.

In this case, the trial court espoused the traditional view that a defendant may not seek to establish his innocence by offering proof of lack of criminality on similar occasions or when similar opportunities were available. *United States v. O'Connor*, 580 F.2d 38, 43 (2d Cir. 1978); *United States v. Shapiro*, 159 F.2d 890, 891 (2d Cir. 1947), *aff'd*, 335 U.S. 1 (1948); *United States v. Null*, 415 F.2d 1178, 1181 (4th Cir. 1969); *United States v. Stoehr*, 196

F.2d 276, 282 (3d Cir.), *cert. denied*, 344 U.S. 826 (1952). This position is defended under general notions of relevance, since it is not usually persuasive to assert that the defendant never committed a crime because he was not always committing crimes. It is also justified by the argument that the defendant is improperly seeking to introduce character evidence in the form of specific good acts.

Acceptable as this position may be in many cases, it loses all force in a case where the gravamen of the government's theory is that the defendant was systematically corrupt in a general course of business. Just as similar acts are circumstantial evidence of a plan or system or scheme, the frequent *absence* of similar acts in a course of business is relevant evidence of the absence of such a plan, system or scheme. In *United States v. Garvin*, 565 F.2d 519, 521 (8th Cir. 1977), for example, the defendant was charged with mail fraud based upon facts suggesting that he had made a series of misrepresentations in his applications for medical insurance and in his claims forms. The Court reversed the conviction because the trial court had excluded the defendant's offer of proof as to his truthful responses on other applications and claims. Distinguishing the general rule that disallows evidence of good acts, the Court pointed out that "the issue here is the existence of a criminal purpose to defraud and a *scheme* to defraud insurance companies by the use of the mails." *Id.*, at 521 (Emphasis supplied). *See United States v. Shavin*, 287 F.2d 647, 653-654 (7th Cir. 1961), *cert. denied*, 375 U.S. 944 (1963); *see also Porcaro v. United States*, 784 F.2d 38, 41 (1st Cir.), *cert. denied*, ___ U.S. ___, 107 S.Ct. 320 (1986) (On remand from ineffective assistance of counsel, defendant would be allowed to present evidence of satisfied customers to counter claim of lack thereof in mail fraud allegation).

The wooden refusal to accept evidence of the absence of similar acts or incidents in such cases has been criticized by Judge Weinstein:

> [I]n an appropriate case testimony about defendant's good acts should be admitted. For instance, once the prosecution is permitted to show other crimes as part of a common plan or scheme, evidence that the defendant did not commit bad acts during the time this scheme was allegedly flourishing would be highly relevant.... Furthermore, evidentiary rules which restrict a defendant's right to present exculpatory materials are suspect.

2 Weinstein & Berger, *Weinstein's Evidence*, ¶ 404[04] at 404-39 (1986).

Here, of course, the government *did* introduce evidence tending to show such a consistent practice of extortion, and then *relied* on that evidence in argument to the jury to urge that the case had been proven as to the specific allegations in the indictment. Had there been no such proof by the government, the trial court's ruling on Scopo's defense case would have been correct. However, having permitted such proof, the court owed Scopo an opportunity to rebut it, and, indeed, turn it to his advantage.

If the existence of a general practice of extortion had a tendency to prove the allegations in the indictment, then it cannot be denied that evidence tending to show that such a practice did *not* exist had a tendency to cast doubt on them. Furthermore, the Government's case gave this supposed general practice a detailed characterization -- involving distinctions as to the dollar amounts of the contracts and which companies could bid on the larger contracts. The

testimony Scopo wished to present to the jury went squarely and centrally to contradict all of these allegations. Yet, the Government was unfairly allowed to have it both ways -- the court accepted the proposition that evidence of a general practice was relevant for the prosecution, but relied on the inapposite argument that evidence of the absence of a general practice was collateral and irrelevant to exclude the defendant's witnesses.

The trial court's exclusion of the testimony was thus a violation of general principles relating to relevance. In turn, this means that it violated the defendant's rights to compulsory process and due process. In *Washington v. Texas*, 388 U.S. 14 (1967), this Court made it clear that compulsory process is not merely a matter of compelling attendance, but also includes the right to present evidence necessary to fulfill the concept of a fair trial.

> The right to offer the testimony of witnesses ... is in plain terms the right to present a defense, the right to present the defendant's version of the facts.... Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense.

Id., at 19; *accord Gilmore v. Henderson*, 825 F.2d 663, 665 (2d Cir. 1987).

Nevertheless, the Second Circuit agreed that the proffered evidence was properly excluded. However, it did so for an entirely different reason than that advanced by the trial court. Ignoring the government's consistently pressed trial theory that the "Colombo Family" scheme was just part of a broader scheme that included the use of the "Club" for

jobs *over* $2,000,000, the Second Circuit held that the existence of the "Club" was irrelevant to the jury's determination of the charges against Scopo:

> Thus, the thrust of the testimony of Scopo's proposed witnesses would have been that in fact there was no Club, no rigging of bids above the $2 million level, and no payoffs above that level. The government's use, however, of Scopo's statements as to the existence of the Club and the extreme penalty for nonpayment to the crime families did not depend on the truth of those statements. Scopo used his statements to control the actions of the firms from which he extorted money and to instill fear of violence in his extortion victims. Thus, for the present case, the important fact regarding the Club was not whether or not it actually existed or how it worked but only whether Scopo made the statements. Even if Scopo's proposed witnesses could have cast doubts on the veracity of Scopo's statements, they could not have cast doubt that the statements were made.

Slip op. at 6879.

The Second Circuit's focus upon Scopo's statements regarding the "Club," as opposed to the question of the alleged existence of this entity, completely overlooks the fact that the government *never* proffered this theory at trial. To the contrary, the government urged only the claim that the Club existed, and that it was part of a broader scheme which included the allegations in Scopo's indictment. For this reason, the Court of Appeals' opinion fails to address the precise issue raised by Scopo. As we have demonstrated below, the alleged existence of the broader

scheme was a keystone of the government's case against Scopo, and Scopo was entitled to introduce evidence rebutting the prosecution's "Club" theory.

Rules of evidence must be interpreted in the light of this Constitutional imperative. Just as the hearsay rule "may not be applied mechanistically to defeat the ends of justice", *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973), neither can the concept of relevance be manipulated to deny the defendant a chance to respond to central features of the Government's case. This is precisely what occurred in the present case, and it is the reason why Scopo's conviction must be reversed.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDICES

Appendix A
Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1020, 1041 August Term, 1987
(Argued: May 2, 1988 Decided: October 28, 1988)

Docket Nos. 87-1469, -1470

UNITED STATES OF AMERICA,

Appellee,

-v.-

RALPH SCOPO and DOMINIC MONTEMARANO,

Defendants-Appellants.

Before:
OAKES, KEARSE, and CARDAMONE, *Circuit Judges.*

Appeals from judgments of conviction entered in the United States District Court for the Southern District of New York, John F. Keenan, *Judge,* for RICO violations, 18 U.S.C. §§ 1962(c) and (d); Hobbs Act violations, 18 U.S.C. §§ 1951; Taft-Hartley violations, 29 U.S C. § 186(b)(1); and bribery of a public official, 18 U.S.C. § 201(b)(3).

Affirmed.

CELIA GOLDWAG BARENHOLTZ, Assistant United States Attorney, New York, New York (Rudolph W. Giuliani, United States Attorney for the Southern District of New York, Peter M. Lieb, Aaron R. Marcu, Assistant United States Attorneys, New York, New York, on the brief), *for Appellee.*

Appendix A
Opinion of the United States Court of Appeals

JUDD BURSTEIN, New York, *for Defendant-Appellant Scopo.*

HAROLD J. BOREANAZ, Buffalo, New York (John F. Humann, Patrick J. Baker, Boreanaz, Baker & Humann, Buffalo, New York, on the brief), *for Defendant-Appellant Montemarano.*

KEARSE, *Circuit Judge:*

Defendants Ralph Scopo and Dominic Montemarano appeal from judgments entered in the United States District Court for the Southern District of New York following a jury trial before John F. Keenan, *Judge*, convicting both defendants on one count of conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO"), in violation of 18 U.S.C. § 1962(d) (1982) (count 1); one count of participating in the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(c) (1982) (count 2); one count of conspiring to extort money, in violation of the Hobbs Act, 18 U.S.C. § 1951 (1982) (count 3); and eight substantive Hobbs Act counts of extortion, in violation of 18 U.S.C. §§ 1951 and 2 (1982) (counts 4-11); and convicting Montemarano on one count of soliciting a bribe and aiding and abetting a labor official in receipt of a bribe, in violation of the Taft-Hartley Act, 29 U.S.C. § 186(b)(1) (1982), and 18 U.S.C. § 2 (count 12); and one count of bribing a public official, in violation of 18 U.S.C. § 201(b)(3) (1982) (count 13). Scopo was sentenced to concurrent prison terms of 10 years each on counts 1 and 2; to a two-year prison term on count 3, to be served consecutively to the 10-year term on count 1; to consecutive one-year prison terms on counts 4, 5, and 6, to be served consecutively to the term on count 3; ~~a~~nd to concurrent one-year prison terms on counts 7-11, to be served concurrently with the terms imposed on the other

counts. Scopo's sentence was to be served concurrently with a 100-year sentence imposed on him in another case, *United States v. Salerno,* No. SSS 85 Cr. 139 (S.D.N.Y. Jan. 13, 1987) (*"Salerno I"* or "Commission Case"). Montemarano was sentenced to concurrent prison terms of 15 years each on counts 1 and 2; to a one-year prison term on count 3, to be served consecutively to the 15-year terms on counts 1 and 2; to consecutive one-year prison terms on counts 12 and 13, to be served consecutively to the term on count 3; and to concurrent one-year prison terms on counts 4-11, to be served concurrently with the terms imposed on the other counts.

On appeal, Scopo contends principally that his rights under the Sixth Amendment to the Constitution were infringed by the trial court's refusal to allow him to be represented by counsel of his choice and its refusal to authorize the issuance of subpoenas to permit him to call certain witnesses. Montemarano principally challenges the trial court's admission into evidence of certain tape recordings and other evidence. For the reasons below, we affirm the judgments of conviction.

I. BACKGROUND

In October 1984, Scopo and Montemarano were indicted, with others, on various charges arising out of activities of the Colombo organized crime family of La Cosa Nostra ("Colombo family"). Prior to or during a trial of most of the defendants under a 51-count superseding indictment, *see United States v. Persico,* 832 F.2d 705 (2d Cir. 1987) (affirming convictions of eight co-defendants found guilty at that trial (*"Persico* trial")), *cert. denied,* 108 S.Ct. 1995 (1988), several of the defendants, including Scopo and Montemarano, were granted severances for health reasons. At the later trial of Scopo and Montemarano, which resulted in the convictions at

issue on the present appeal, the government voluntarily dismissed several counts, and the indictment was redacted and renumbered into 13 counts. Our references are to the indictment as renumbered.

The trial centered principally on allegations that from at least 1981 through the date of the indictment, the Colombo family, by means of its control of various labor unions, had engaged in a scheme of extorting moneys from New York City area construction companies in connection with concrete-pouring contracts having a value of $2 million or less. The government's evidence was presented principally through (a) tape recordings of conversations resulting from extensive court-ordered wiretapping, electronic surveillance, and undercover investigations, and (b) testimony of associates and victims of the Colombo family. Since there is no substantial challenge to the sufficiency of the evidence to support the convictions, we summarize but briefly the proof at trial, taken in the light most favorable to the government.

The Colombo family, headed by codefendant Carmine Persico, operated through entities known as "crews." Each crew consisted of a "capo" or leader, "soldiers" who had been made members of the family, and a number of non-family-member "associates." Montemarano was a capo in the Colombo organization. Scopo was a soldier in the family and was president of the District Council of Cement and Concrete Workers Unions, an alliance of labor unions that represented New York City's concrete workers. At the instruction of Montemarano and other leaders in the Colombo family, Scopo used this position to influence and control the decisions of certain individual unions in the construction industry; he used his control of the unions to extort payments from construction companies in exchange for guaranteeing labor peace and allowing the companies to

use workers not affiliated with his unions. A portion of the money extorted was kept by Scopo and the remainder was paid to other members of the Colombo family. A series of witnesses testified to acts of extortion by Scopo, and there was evidence that during the period in question, virtually all concrete-pouring contracts in Manhattan having a value of $2 million or less were controlled in this way.

As to Manhattan projects whose concrete contracts had a value of more than $2 million, which were a subject of *Salerno I* rather than the present case, there was evidence that the Colombo family coordinated with three other organized crime families in New York City to control bidding and awards. These families organized a "Club" of six contractors, rigged bids on these larger contracts, and prevented awards to any firm outside the Club. Club members paid Scopo two percent of the contract price, which was then divided among the four organized crime families.

The trial record also included evidence that in 1981, at a time when Persico was incarcerated, Montemarano sought to bribe a prison official to arrange the transfer of Persico to a different prison.

The jury found Scopo guilty on all 11 counts in which he was named, *i.e.*, those charging RICO and Hobbs Act conspiracies, one substantive RICO violation, and eight substantive Hobbs Act acts of extortion. Montemarano was found guilty on these 11 counts and on one count of bribery of a union official and one count of bribery of a public official. Each defendant was sentenced as indicated above.

II. DISCUSSION

On appeal, Scopo contends principally that his Sixth Amendment rights were violated by the court's refusal to

permit him to be represented by counsel of his choice and by its refusal to permit him to subpoena a number of contractors to testify in his behalf at trial. In addition, both defendants contend (1) that the court should have excluded from evidence certain tape recordings on the ground that the tapes lacked the seal required by the federal wiretapping statute, and (2) that they were denied a fair trial because of (a) prejudicial publicity that came to the jury's attention during trial, and (b) the court's unrelated excusing and nonreplacement of one juror during the jury's deliberations. Montemarano also challenges certain of the court's evidentiary rulings. We have considered these and all other arguments made by defendants on appeal and find them to be without merit.

A. Scopo's Right to Counsel

At trial, Scopo appeared *pro se,* assisted by counsel appointed for him by the court, because his preferred attorney was unavailable. Scopo contends that the court's refusal to grant him a continuance of the trial date so that he could be represented by counsel of his choice deprived him of his rights under the Sixth Amendment. Given the sequence of events described below, we disagree.

The original *Persico* trial began in October 1985 and lasted some eight months. Seven weeks into that trial, Scopo was granted a severance for reasons related to his health. In 1986, Scopo went to trial in *Salerno I;* convicted in that case, he was sentenced on January 13, 1987, to a 100-year term in prison. On January 21, 1987, Judge Keenan held a scheduling conference in the present case and entered an order scheduling the trial of Scopo and Montemarano to begin on May 4, 1987.

At the original trial, Scopo had been represented by Barry Slotnick, Esq. An associate of Slotnick attended

the January 21 conference and unsuccessfully opposed the May 4 trial date, advising the court that, because of existing trial commitments, Slotnick would not be available in the present case until "June at the very earliest." In light of this representation, the court scheduled another conference for February 6 to explore the matter of who would represent Scopo at trial.

At the February 6 conference, Slotnick revealed that he had other trial commitments that would keep him occupied past June and probably through August. He urged the court to postpone trial of Scopo until the conclusion of the appeals in *Salerno I*, reasoning that if Scopo's 100-year sentence were affirmed, a plea agreement could be reached and a trial would be unnecessary. The court rejected this argument, noting the likelihood that the appeals in *Salerno I* would not be decided before sometime in 1988, the need to try Montemarano in any event, and the nearly complete overlap between the charges against Montemarano and Scopo; in addition, a third severed defendant might also eventually be tried. Considerations of judicial efficiency thus suggested that Montemarano and Scopo be tried together in order to minimize the number of times the court or the government would be required to conduct lengthy trials on the same charges. Accordingly, the court refused to alter the May 4 trial date. It stated that it would relieve Slotnick as counsel and instructed him to return for a conference on February 20 to report on Scopo's progress in obtaining new counsel.

On February 20, Slotnick did not appear because he was ill. Slotnick's associate reaffirmed that Slotnick's trial schedule was as it had been represented at the February 6 conference. The court stated that the May 4 trial date was firm, reiterated that Scopo should obtain another attorney, and scheduled another conference for February 27.

At the February 27 conference, Slotnick informed the court that Scopo had attempted to retain for the May 4 trial the attorney who had represented him in *Salerno I*, but that that attorney was unavailable. Slotnick again urged that trial be postponed until September, but he conceded that it was a realistic possibility that he would not be available for trial until November or December. The court denied the request and scheduled another conference, ordering that Scopo be brought to attend in person.

At a March 12 conference, Scopo appeared and stated that he had contacted two other attorneys but that they were otherwise occupied. He urged the court to delay the trial until Slotnick could represent him. The court denied the request. Noting that from January 21 on, it had repeatedly directed that if Slotnick could not be available in May Scopo was to obtain other counsel, the court again directed Scopo to obtain another attorney and stated that if he did not, he would be required to go to trial without an attorney. The court scheduled another conference for March 20.

Further conferences were held on March 20, March 27, March 30, and April 3. Scopo reported that he had not retained new counsel and that he wanted Slotnick to represent him. At each conference, the court advised Scopo that if he did not obtain new counsel, he would be required to proceed *pro se*. On March 30, Scopo filed a formal motion for a continuance of the May 4 trial date. The court denied the motion in a Memorandum Opinion and Order dated April 7, 1987, summarizing the events since January 21, and noting that Slotnick had been unable to guarantee that he would be available for the present trial even as early as September, that the court had repeatedly ordered Scopo to retain new counsel, that Scopo's efforts in that regard had been half-hearted, and that the time afforded Scopo to obtain new counsel had been more than reasonable. The court concluded that, in

all the circumstances, the orderly administration of justice required that the trial proceed as scheduled.

Another conference was held on April 13. Scopo reported that he had not obtained a new attorney and that Slotnick was his attorney of choice. The court stated that it would appoint a stand-by attorney to assist Scopo at trial.

Over Scopo's objection, the court appointed stand-by trial counsel for Scopo on April 22. That attorney, Austin Campriello, Esq., assisted Scopo throughout the trial. Scopo allowed him to make the opening statement and summation on Scopo's behalf, to make motions, to object to evidence, and to cross-examine the government's witnesses.

The Sixth Amendment gives a defendant in a criminal proceeding the right to "the Assistance of Counsel for his defence." Recognition of this right requires that "a defendant . . . be afforded a fair opportunity to secure counsel of his own choice." *Powell v. Alabama*, 287 U.S. 45, 53 (1938). Nonetheless, the "right to choose one's own counsel is circumscribed in several important respects," *Wheat v. United States*, 108 S.Ct. 1692, 1697 (1988), and "must at times give way to the need for the fair and efficient administration of justice," *United States v. Cicale*, 691 F.2d 95, 106 (2d Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983).

The matter of whether or not to adjourn a trial date "is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel." *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964); *see Avery v. Alabama*, 308 U.S. 444, 446 (1940). Thus, " 'where the inability of retained counsel to serve gives promise of unreasonable delay or inconvenience in completing the trial, the court may require the defendant to secure other

counsel.' " *United States v. Cicale*, 691 F.2d at 106 (quoting *United States v. Bentvena*, 319 F.2d 916, 936 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963)). "[O]nly an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel." *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983) (quoting *Ungar v. Sarafite*, 376 U.S. at 589).

We see no abuse of discretion in the court's insistence on the May 4, 1987 date. The date was set three and one-half months in advance; though repeated requests were made for an adjournment until September, there was no guarantee, as Slotnick conceded, that Slotnick would be available in September. The case had been pending more than two years, Montemarano was awaiting trial, and it made little sense to try him and Scopo separately in light of the overlapping charges. Scopo was forewarned in January 1987 that Slotnick could not represent him at trial in May, and from that time on, the court repeatedly made it clear that it would not adjourn the May 4 date and ordered Scopo to find new counsel. Plainly, Scopo was given ample opportunity to select another attorney to represent him at trial, and the denial of an adjournment did not violate his Sixth Amendment rights.

B. The Denial of Scopo's Request for Subpoenas

During the trial, Scopo sought to call as witnesses 13 persons involved in the construction industry (the "industry witnesses") to testify principally that there was no bid-rigging in concrete-pouring contracts above the $2 million level and that Scopo had never extorted money from them. The court denied the subpoenas on the ground that the proposed testimony would be merely collateral to the issues in the case. The charges here focused solely on concrete-pouring contracts worth $2

million or less. A bill of particulars furnished by the government explicitly so stated, and all of the counts against Scopo alleged extortionate schemes or acts with respect to contracts at this level. Though the government believed the scheme alleged here was complementary to the scheme in which four organized crime families in New York City controlled the award of Manhattan concrete contracts worth more than $2 million, charges relating to the latter scheme were included in the *Salerno I* indictment and excluded from this case. Hence, the court concluded that the testimony to be elicited from Scopo's proposed industry witnesses would not address any of the charges in the present indictment, and it refused to issue the subpoenas.

Scopo points out that the government's proof at trial, both the live testimony and the tapes of conversations to which Scopo was a party, included statements by Scopo with respect to concrete-pouring contracts worth more than $2 million, and he contends that the court's refusal to subpoena his industry witnesses infringed his Sixth Amendment right to rebut the government's proof. We disagree.

The Sixth Amendment, by its terms, gives the defendant in a criminal trial the right "to have compulsory process for obtaining witnesses in his favor." This does not, however, guarantee him an unrestricted right to compel the presence of any and all witnesses he may choose. Rather, the defendant who complains that his right to call witnesses has been violated "must at least make some plausible showing of how their testimony would have been both material and favorable to his defense." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982); *see id.* n. 7; *United States v. Ginsburg*, 758 F.2d 823, 831 (2d Cir. 1985); *United States v. Taylor*, 562 F.2d 1345, 1362 (2d Cir.), *cert. denied*, 434 U.S. 853 (1977).

In assessing the value of proposed witnesses' testimony, we must bear in mind that the trial judge has wide discretion to exclude proffered evidence that is collateral, rather than material, to the issues in the case. *E.g.*, *United States v. Gleason*, 616 F.2d 2, 21-23 (2d Cir. 1979), *cert. denied*, 444 U.S. 1082 & 445 U.S. 931 (1980); *cf.* Fed. R. Evid. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed . . . by considerations of undue delay [or] waste of time . . . ."). If the court could properly have excluded proffered testimony on the ground that the evidence was collateral, its refusal to subpoena witnesses who were to give that testimony cannot be deemed error.

The principal witness who referred to the contracts worth more than $2 million was Stanley Sternchos, who testified that his company, Technical Concrete Construction Corporation ("Technical"), had been forced to pay Scopo sums totaling between $800,000 and $900,000 from 1981 to 1984. Sternchos's testimony with respect to conversations with Scopo included the following.

Scopo told a Technical partner in 1980 that Technical would have to pay Scopo one percent of each contract it was awarded if it wanted to do business in New York City. A portion of this money would be passed on to Scopo's crime family. When Technical thereafter tried to bid on contracts worth more than $2 million, Scopo told Sternchos that was impermissible because such projects were allocated among six firms, which he named, each of which was controlled by one of four organized crime families. Scopo referred to these firms as the "Club." He described for Sternchos an incident in which a Club member had failed to pay the required percentage to the four families and stated that only the fact that the company was going out of business prevented its principal from being killed. Although Scopo never directly threatened him, Sternchos testified that Scopo's mention of this incident "certainly pointed out to [Sternchos] that

Ralph Scopo felt that he and his people had the power to kill anybody whenever they felt like it," and Sternchos feared for his own physical safety and that of his family if Technical did not pay Scopo.

The evidence of Scopo's statements with respect to the prevalence of payoffs in the construction industry and with respect to control of the award of contracts worth more than $2 million was relevant to the present case in two respects. First, many of these statements were intertwined with Scopo's extortion of moneys on contracts worth less than $2 million and were needed as background to clarify Scopo's demands of companies such as Technical. Second, an element of the nine Hobbs Act counts (which in turn were charged as RICO predicate acts) was the extortion of money through the "wrongful use of actual or threatened force, violence, or fear." 18 U.S.C. § 1951(b)(2). Scopo's statements to Sternchos as to the sole reason the four crime families had decided not to kill a man who failed to make a required Club payment plainly provided a sound basis for Sternchos to fear violence should Technical discontinue paying Scopo.

Both of these uses of the over-$2 million evidence served to underscore the collateral nature of the rebuttal proposed by Scopo. His proposed industry witnesses included five officials of four of the firms that Sternchos said Scopo had identified as members of the Club. Scopo informed the court that he expected these five to testify that he had never extorted money from them or that as far as they knew there was no Club. Five other proposed witnesses were to testify that although their firms were not alleged to be members of the Club, they had obtained contracts worth more than $2 million. Two others were to testify that their company had 60% of the concrete business in the metropolitan area, that as far as they knew there was no Club, and that Scopo had never tried to shake them down. The last proposed witness, a

subcontractor, was to testify that Technical had never asked it to inflate its bid, as Technical might have done in order to provide funds for a payoff to Scopo.

Thus, the thrust of the testimony of Scopo's proposed witnesses would have been that in fact there was no Club, no rigging of bids over the $2 million level, and no payoffs above that level. The government's use, however, of Scopo's statements as to the existence of the Club and the extreme penalty for nonpayments to the crime families did not depend on the truth of those statements. Scopo used his statements to control the actions of the firms from which he extorted money and to instill fear of violence in his extortion victims. Thus, for the present case, the important fact regarding the Club was not whether or not it actually existed or how it worked but only whether Scopo made the statements. Even if Scopo's proposed witnesses could have cast doubts on the veracity of Scopo's statements, they could not have cast doubt that the statements were made.

In sum, the trial court's view that the proposed testimony of Scopo's industry witnesses was directed to a collateral matter was entirely sound. None of the proposed testimony would have contradicted the charges in the present indictment; it would not have dealt with contracts of $2 million or less; and it would not have addressed the crucial fact that Scopo made the statements. Accordingly, we reject Scopo's challenge to the trial court's refusal to issue subpoenas for his proposed industry witnesses.

C. Admissibility of Certain Tapes

Part of the government's proof that Scopo and Montemarano were members of the Colombo crime family consisted of surveillance tapes of conversations intercepted at a Manhattan social club pursuant to court orders entered under Title III of the Omnibus Crime

Control and Safe Streets Act ("Title III"), 18 U.S.C. §§ 2510-2521 (1982 & Supp. IV 1986). These tapes had been judicially sealed in accordance with 18 U.S.C. § 2518(8)(a). When they were offered at the trial of Scopo and Montemarano, defendants objected on the ground that the tapes as then offered were not sealed. The district court, declining to reach the issue of whether defendants had waived their objection by failing to raise it prior to trial, *see id.* § 2518(10)(a), overruled the objection on the ground that the tapes had been unsealed pursuant to court orders for use in several cases including the present case, *Salerno I,* and a second Salerno case, *United States v. Salerno,* No. 86 Cr. 245 (S.D.N.Y. May 1, 1986) (*"Salerno II"*), and that there is no statutory requirement that judicially unsealed tapes be resealed.

Defendants renew their challenge here, arguing that the tapes should have been resealed in order to ensure their integrity. Though we would agree that at some point resealing should occur, that point was not reached here.

As we have noted, an important purpose of the statutory sealing requirement is the prevention of manipulation or alteration of the recordings of the intercepted conversations. *United States v. Massino,* 784 F.2d 153, 156 (2d Cir. 1986); *United States v. Gigante,* 538 F.2d 502, 505-06 (2d Cir. 1976). Thus, tapes made pursuant to Title III may not be admitted in evidence without "the seal provided for by [§ 2518(8)(a)], or a satisfactory explanation for the absence thereof." 18 U.S.C. § 2518(8)(a). The statute envisions "continuous judicial scrutiny of the entire process of obtaining and utilizing recorded conversations," *United States v. Gigante,* 538 F.2d at 506, and we are persuaded that once the trial level proceedings to which the unsealing order pertained have concluded, the tapes should be resealed in order to preserve their integrity should their admission be sought

in another trial -- either in another case or in a retrial of the same case after appeal.

Nonetheless, absent some condition imposed by the unsealing judge, we conclude that where tapes have been unsealed pursuant to court order for use in given proceedings, there is no requirement that they be resealed prior to the conclusion of those proceedings. For this reason, we reject defendants' challenge to the admission of the tapes in question on this appeal. The proceedings in *Salerno II*, for which an unsealing order had been entered, were still in progress at the time Scopo and Montemarano went to trial. Hence the absence of a seal was satisfactorily explained.

D. Other Contentions

Defendants' remaining contentions include challenges to the court's evidentiary rulings and to its supervision of the jury. None of them requires extended discussion.

1. Admissibility of the Funeral Photos

In support of the allegation that Montemarano was a member of the Colombo family, the government offered, *inter alia*, surveillance photographs that showed him outside a church before and after a funeral, mingling with other members of organized crime. Montemarano objected to the introduction of this evidence on the ground that it infringed his First Amendment right to freely exercise his religion. In a Memorandum Opinion and Order dated July 6, 1987, the district court overruled the objection, noting that the photos did not depict the celebration of any religious practice but only the "mingling of persons in public view before or after service"; it concluded that the "remote, indirect effect" of the government's covert surveillance of the exterior of

the church was clearly "outweighed by the compelling interest of society in the effective enforcement of its penal laws." We agree.

Recognizing that an individual aware of government surveillance at his place of worship could feel a chilling effect on his exercise of religion, we think it appropriate to analyze Montemarano's contention within the three-part framework set forth in *Branzburg v. Hayes*, 408 U.S. 665, 700 (1972). Under that analysis, in order to justify intrusion into an individual's first amendment rights, the government must show that its actions (1) pursue a "compelling" state interest, *id.*, (2) " 'bears[ ] a reasonable relationship to the achievement of the governmental purpose,' " *id.* (quoting *Bates v. City of Little Rock*, 361 U.S. 516, 525 (1960)), and (3) are not an "unduly broad means [that] unnecessar[ily] impact on protected rights," *Branzburg v. Hayes*, 408 U.S. at 680-81. We conclude that the government has carried its burden.

Investigation of suspected criminals is a fundamental and compelling interest. Investigations with respect to certain types of suspected criminal activity, such as conspiracy or RICO violations, must focus on interactions between two or more persons. Such interactions are likely to be covert, and the opportunities to document them, especially between or among organized crime figures, are rare. Use of ordinary surveillance techniques in public places bears a reasonable relationship to the governmental goal. We see no error in the district court's finding that the surveillance conducted here was no more intrusive than was necessary in order to record the interactions. The photos were not taken inside the church and did not record any religious ceremony; they were taken before and after the ceremonies. In addition, they were taken covertly, thus

avoiding any potentially menacing effect that might be felt from a perceptible government presence.

We conclude that the *Branzburg* test was met and that the district court did not err in rejecting Montemarano's First Amendment argument.

2. Admissibility of the Agro Plea of Guilty

Count 13 of the redacted indictment charged that Montemarano had participated in the bribery of a federal prison official in an effort to have Persico transferred from the prison he was in to a preferred prison. In support of this charge, the government presented evidence that Montemarano had approached one Thomas Agro, a soldier in the Gambino organized crime family, seeking permission to have one of Agro's underlings arrange the transfer, and that Agro had cooperated in these efforts. Agro was later indicted on a variety of charges in another case, and part of the government's evidence on count 13 in the present case was Agro's allocution in connection with his 1987 plea of guilty to two counts of racketeering in that case, *United States v. Agro*, No. 86 Cr. 452 (E.D.N.Y. Feb. 11, 1987). In that allocution, Agro admitted that from August 1981 to September 1982, he and others (unnamed) had attempted, by means of bribery, to move Carmine Persico "through the prison system."

Over Montemarano's hearsay objection, the trial court admitted the Agro allocution into evidence on the ground that it was a declaration against Agro's penal interest and thus not excludable as hearsay. *See* Fed. R. Evid. 804(b)(3). Montemarano challenges this ruling, arguing that in fact Agro was terminally ill at the time of his plea and that his plea of guilty served to keep him out of prison and hence was not really against his penal interest. We find no error in the court's ruling.

In general a plea of guilty is a statement against the penal interest of the pleader for the obvious reason that it exposes him to criminal liability. *See, e.g., United States v. Winley*, 638 F.2d 560 (2d Cir. 1981), *cert. denied*, 455 U.S. 959 (1982). Likewise, so much of the allocution as states that that defendant committed or participated in the commission of a crime, thereby permitting the court to accept the plea, *see* Fed. R. Crim. P. 11(e), is normally against his interest. If, however, a pleading defendant had an agreement with the government or with the court that he would not be punished for the crimes to which he allocuted, then that allocution would not subject him to criminal liability and would not constitute a statement against his penal interest within the meaning of Rule 804(b)(3).

Agro's plea and allocution were properly viewed as statements against his penal interest. The plea exposed him to a potential sentence of 40 years' imprisonment and fines totaling $275,000. There is no evidence that he had entered into any understanding with the government or the court that he would not be sentenced for the crimes to which he allocuted. And while we stress that a defendant's unilateral belief would not suffice to neutralize the exposure ordinarily inherent in a self-incriminating plea or allocution, we also point out that even if Agro privately believed that because of his illness the court would not require him to suffer incarceration, there would be little reason for him to suppose that the court would also therefore excuse him from paying a fine.

3. Jury Exposure to Publicity During Trial

During the trial, the Tuesday June 23, 1987 edition of the *New York Post* published an article discussing the legal difficulties of Bess Meyerson; accompanying the article was a series of photographs of seven men, including Scopo. Under Scopo's picture was the caption

"Ralph Scopo: former president of Cement and Concrete Workers' Union convicted in 'Commission Case,' now serving 100 years." The June 23 *Post* was seen by several of the jurors. Defendants contend that they are entitled to a new trial because the trial court inadequately explored the potential prejudicial effect of the jurors' exposure to the article. We disagree.

When jurors have been exposed to prejudicial publicity during trial, the trial court must determine "whether the jurors retained the requisite impartiality." *United States v. Gigante*, 729 F.2d 78, 82 (2d Cir.), *cert. denied*, 467 U.S. 1206 (1984). We have approved a three-step process that may be followed by the trial judge to determine whether prejudicial publicity requires a mistrial:

> The simple three-step process is, first, to determine whether the coverage has a potential for unfair prejudice, second, to canvass the jury to find out if they have learned of the potentially prejudicial publicity, and, third, to examine individually exposed jurors--outside the presence of the other jurors--to ascertain how much they know of the distracting publicity and what effect, if any, it has had on that juror's ability to decide the case fairly.

United States v. Gaggi, 811 F.2d 47, 51 (2d Cir.), *cert. denied*, 107 S.Ct. 3214 (1987). The trial court is accorded substantial discretion in making these determinations, and its conclusion that the jurors remained impartial will not be overturned on appeal absent an abuse of discretion. We find no abuse of discretion here.

The matter of the *Post* article was called to the court's attention by Scopo's stand-by counsel on Thursday June 25, there having been no trial session on June 24. The court promptly distributed to the jurors

questionnaires asking whether they had read the *Post* "since Monday of this week," and if so whether they had read anything about anyone connected with the present case. Seven jurors responded in the affirmative to at least one of the two questions; those jurors were questioned by the trial judge in open court, with the other jurors absent; each juror was admonished not to discuss the court's questions with the other jurors.

Of the jurors questioned, one, although he had not read anything about Scopo, had been told the substance of the caption by someone unconnected with the case. This juror doubted his continued ability to judge Scopo impartially, and he was dismissed from the jury. Five of the jurors stated that they had seen (or thought they had seen) the picture of Scopo and read the name "Ralph Scopo" but had not read the rest of the caption; each said that seeing Scopo's picture in the paper had not affected his or her ability to be a fair and impartial juror. The seventh juror (No. 7) stated that she had seen the pictures and "recognized the names," but had flipped the page and "didn't read anything." She stated that what she had seen would not affect her judgment concerning any defendant.

In addition to these seven jurors, the court questioned one juror (No. 4) who had answered both parts of the questionnaire in the negative. Juror No. 4 was questioned because one of the seven said she had seen Scopo's picture while looking over the shoulder of No. 4, who was holding the paper. Juror No. 4, when questioned by the court, admitted he had been mistaken about his negative response and stated that he had not read the *Post* on Tuesday. The court pointed out that it had not asked anything about Tuesday, and it renewed the question as to whether No. 4 had read the *Post* since Monday. No. 4 stated that because there had been no court session on Wednesday, he had lost track of what days the court's questions addressed; he stated that he had not read the

Post earlier in the week and had not seen anything in the *Post* about anyone connected with this case. The court asked if he was sure; he responded that he was.

In this Court, defendants contend that the trial court should have pursued the questioning of juror No. 4 because of his reference to "Tuesday" and of juror No. 7 because her statement that she "didn't read anything" was inconsistent with her statement that she had seen the names under the pictures. As to No. 7, we disagree; though defendants promptly asked the trial court to question her further, evaluation of the juror's credibility was within the province of the court, and the court was entitled to accept the juror's statement that she had seen the pictures and the names but had not read the news story or any other part of the captions. As to No. 4, perhaps more questions could have been asked; but the court did not fail to cross-examine the answers given, and its further questioning elicited the responses that the juror had not read anything about anyone connected with the case. There is no indication in the record that defendants suggested any additional probing of juror No. 4, and we cannot say that the decision to credit the responses elicited was an abuse of the court's discretion.

4. The Excusing and Nonreplacement of a Juror

On the second day of jury deliberations, a juror informed the court that because of the illness of his mother and his inability to be in contact with her during deliberations, he felt he would be unable to render a fair verdict. All parties agreed that the juror should be excused. Defendants then moved for a mistrial, and when that motion was denied, they urged the court to substitute an alternate juror for the excused juror. The court decided to have the jury proceed with 11 jurors, stating its understanding that this was the preferred method. Defendants contend that this constituted reversible error. This contention has no merit.

Fed. R. Crim. P. 23(b) provides, in pertinent part, that "if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors." This Court has stated that proceeding with 11 jurors is the "preferred" option. *See United States v. Stratton*, 779 F.2d 820, 831 (2d Cir. 1985), *cert. denied*, 476 U.S. 1162 (1986); *see also United States v. Gambino*, 788 F.2d 938, 948-49 (3d Cir.), *cert. denied*, 107 S.Ct. 98 (1986). Accordingly, we reject defendants' challenge.

CONCLUSION

We have considered all of the arguments made by defendants on these appeals and have found them to be without merit. The judgments of conviction are affirmed.

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Appendix B
Order of United States Court of Appeals On Petition for Rehearing and Suggestion for Rehearing In Banc

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the Fourth day of January, one thousand nine hundred and eighty-nine.

FILED: January 4, 1989

UNITED STATES OF AMERICA,
Appellee,

-against-

RALPH SCOPO,
Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by defendant-appellant, Ralph Scopo.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

Appendix B
Order of United States Court of Appeals
On Petition for Rehearing and Suggestion for
Rehearing In Banc

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

/s/ _____

By: Fred M. Cassidy,
Chief Deputy Clerk